No. 83-1655

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN W. SOWERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. C1-C2) is unreported. The opinion of the district court is not reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1984. The petition for a writ of certiorari was filed on March 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner did not include a copy of the district court's opinion of May 6, 1983 in the appendix to his petition for a writ of certiorari. We have lodged a copy of that opinion with the Clerk of this Court.

STATEMENT

In 1980, after a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of one count of conspiracy to defraud, in violation of 18 U.S.C. 371; one count of wire fraud, in violation of 18 U.S.C. 1343; one count of mail fraud, in violation of 18 U.S.C. 1341; two counts of causing fraudulently taken property to move in interstate commerce, in violation of 18 U.S.C. 2314; and one count of causing a person to travel in interstate commerce for a fraudulent purpose, in violation of 18 U.S.C. 2314. Petitioner was sentenced to concurrent terms of two and one-half years' imprisonment on each count. The court of appeals affirmed his convictions (Pet. App. A1). On March 7, 1983, petitioner filed a motion under 28 U.S.C. 2255 seeking to have his conviction vacated. The district court denied relief (Pet. App. B1), and the court of appeals affirmed (Pet. App. C1-C2).

1.a. The evidence adduced at trial is set out in the unpublished opinion of the court of appeals on direct appeal (*United States* v. *Sowers*, No. 80-1974 (10th Cir. Mar. 15, 1982), slip op. 2-7):

> This case involves a plan to ship alleged Mayan antiquities from Guatemala to Brussels. In January of 1975 [petitioner] contacted Robert Bolton, a managing partner in an art sales company in Oklahoma City, about a business opportunity in pre-Columbian art. [Petitioner] explained that the venture promised millions of dollars in profits. Mr. Bolton later met in Dallas with [petitioner] and a Mr. Ovid Kosovsky who claimed to be an archeologist. Mr. Kosovsky told Mr. Bolton that he had discovered a series of caves in Guatemala that contained 960 ancient Mayan stone carvings known as "stelae." He said that buyers in Brussels were willing to purchase the stones but funds

were needed to remove the artifacts from the mountains and crate and ship them to Brussels. He also said that they expected further profits from a documentary that Mr. Kosovsky was preparing in connection with NBC and National Geographic Magazine.

Later [petitioner and] Messrs. Bolton and Kosovsky met in Oklahoma City to enter into an agreement. [Petitioner] drafted two documents. One was an agreement between Mr. Bolton and Mr. Kosovsky whereby Mr. Bolton agreed to invest $79,000 in return for a 45% interest in the project. He also executed an "escrow" agreement designating himself as the escrow agent with a 10% interest in the project.

Shortly thereafter, Mr. Bolton and his employee, Carol Fife, went to Miami to place some of the stones in a warehouse as security for the agreement. Mrs. Fife examined the stones and told Mr. Bolton that they appeared to be carved with a modern tool and some appeared to be molded. This opinion was relayed to [petitioner,] who told Mr. Bolton that Mrs. Fife did not know what she was talking about, and assured him that there was nothing to worry about. So Mr. Bolton provided $5,000 to place the stones in the warehouse.

The next month Mr. Bolton wired $4,500 to Mr. Kosovsky in Guatemala in accordance with [petitioner's] instructions. Thereafter Mr. Bean, Mr. Bolton's business partner, took several stones to Dr. Michael Coe, a professor at Yale University and a leading expert in pre-Columbian art. Dr. Coe told him that the stones were not authentic. This was repeated to Mr. Bolton who immediately told [petitioner]. [Petitioner] was angered as he considered this to be a breach of the confidentiality required by the agreement. [Petitioner] apparently contacted Mr. Kosovsky, then told Mr. Bolton that he never should have contacted Dr. Coe.

Despite the opinions that the stones were fabricated, Mr. Bolton began soliciting more funds for the project. [Petitioner] wrote a letter for him to assist in obtaining funds. Mr. Bolton arranged for three potential investors to meet in his office with him and [petitioner]. At that meeting [petitioner] discussed the project in detail and indicated that the stones had been authenticated in [a] writing which was in his office. He also mentioned that NBC had contracted to do a documentary on the project which would provide $250,000 in profit.

After this meeting, [petitioner] left for Guatemala to arrange the shipping of the stones to Brussels. He met with a shipper and lawyer to enter into a contract to package and ship "copies of Maya stelae" that were "fabricated in Jocotan." The contract also said that he would buy the stones from a "factory in Jocotan." He testified that he did not know about those terms since the contract was in Spanish and he depended upon Mr. Kosovsky to translate for him.

After the contract was executed [petitioner] called Mr. Bolton from Guatemala to inform him that the project was going better than expected and that the shipping was in order. Mr. Bolton had given him a signed blank check for shipping. During the phone conversation, Mr. Bolton told him to make the check payable to Eduardo Hecht for $12,000 to cover shipping charges.

Before [petitioner] left Guatemala he met with Abraham Reyes Lopez, a sculptor living in Jocotan. Over the years Mr. Kosovsky had hired Mr. Lopez to cut stones. Mr. Kosovsky had ordered over 600 stones. To pay for these orders [petitioner] gave the sculptor two checks totaling $11,000 and Mr. Kosovsky gave him a $4,000 check.

Upon returning from Guatemala [petitioner] met with the three investors again. He told them he had seen the cave site when in fact he had not. He described the cave as filled with "thousands of the pieces of the gods, altars, some Mayan calendars, Mayan books, jade, [and] pottery." He showed them photographs of artifacts he said had been taken at the site. The investors then entered into an agreement with Mr. Bolton to invest a total of $25,000 with $12,500 being payable immediately. Other investments were secured to help cover the costs of shipping the stones out of Guatemala.

Following these investments Mr. Bolton traveled to Guatemala, and upon arrival gave Mr. Kosovsky a check for transporting the stones to Brussels. After the completion of his trip, Mr. Bolton apparently became convinced that the project was a fraud. However, he continued to accept investments without telling of his suspicions. Meanwhile he continued to attempt to have the stones authenticated. Three experts concluded that the stones were not Mayan antiquities. Mr. Bolton told [petitioner] of these findings but he rejected them telling Mr. Bolton that he was going to ruin the whole project by trying to get the stones authenticated.

[Petitioner] continued to approach investors including a Mr. Brouse who invested $6,000 in the project after being told that the project was an excellent and valid investment. Later [petitioner] assured Mr. Brouse that an expert would authenticate the objects as soon as they arrived in the United States.

[Petitioner] told Mr. Bolton that he had breached his contract with Mr. Kosovsky because he had failed to pay the $79,000 balance. Mr. Bolton responded that since he could not get the pieces authenticated he could not raise any more money so he wanted out. Thereafter

> [petitioner] contacted other investors attempting to replace Mr. Bolton. Additionally, he circulated brochures and letters to potential investors and interior designers attempting to sell both "genuine Mayan artifacts" and decorations. All these solicitations were with the knowledge that several experts had concluded the stones were not really Mayan antiquities and none had said they were genuine.

b. On direct appeal, the court of appeals, after carefully examining the evidence on each count, found the evidence sufficient to support the conviction on each. *United States* v. *Sowers*, slip op. 8-15. The court also held that petitioner could not challenge the allegedly erroneous admission of hearsay because counsel did not object at trial (*id.* at 7-8). Finally, the court determined that the trial court did not act improperly in declining to declare a mistrial when it learned that an alternate juror, after he had been discharged, had discussed the status of the jury's deliberations with three jurors (*id.* at 15). The court of appeals noted that the district court had inquired into the effect of the conversations through in-chambers questioning of the jurors, the alternate juror, and petitioner and his wife, and that all of the jurors had said that they knew of no reason why they could not render a fair and impartial verdict. On this basis, the district court ~~the~~ determined that no influence had been exerted over the jurors and that there was no basis for disqualifying any of them. In the court of appeals' view, the district court's inquiry clearly established that the communications did not concern the substance of the jury's deliberations and revealed nothing more than the fact that the jury was deadlocked — a fact already announced by the district court. For this reason, the court of appeals concluded that the communications were harmless. *Id.* at 17-19.

2.a. On March 7, 1983, petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, contending, inter alia, that he had received ineffective assistance of counsel at trial. The district court denied relief, finding petitioner's claim of ineffective assistance of counsel to be "wholly without merit." *United States* v. *Sowers, supra* note 1, slip op. 7. It noted that petitioner's retained counsel were "highly competent, respected members of the bar" and that, based on its observations at trial, counsel's representation "was both competent and effective" (*id.* at 3). The court further observed that petitioner's allegations of ineffective assistance were "largely conclusory" and mostly related to matters of "trial strategy," for which counsel requires wide latitude (*id.* at 3-4). The district court also found no merit in petitioner's allegations of prosecutorial misconduct, improper joinder of co-conspirators, and judicial bias (*Id.* at 5-7).

b. The court of appeals affirmed in a brief order. After reviewing the record, the court determined that petitioner had not been denied effective assistance of counsel. It noted that petitioner's allegations consisted of complaints about counsel's tactical decisions, which, the court explained, do not warrant relief on collateral attack. The court also concluded that petitioner's claim of prejudicial joinder of alleged co-conspirators had been raised on direct appeal and would not be reconsidered on collateral attack and that there was nothing in the record to support his claims of judicial bias and prosecutorial vindictiveness. Pet. App. C1-C2.

ARGUMENT

Petitioner's contention (Pet. 8-15) that he received ineffective assistance of counsel at trial was correctly rejected by the courts below and does not warrant further review by this Court. As the Court recently observed, "[t]he benchmark for judging any claim of ineffectiveness must be whether

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 16. "When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred." *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 8 (footnotes omitted). There can be no claim here that petitioner did not have the benefit of a "true adversarial criminal trial." Petitioner concedes "that defense counsel made numerous objections at trial, cross-examined witnesses, and presented evidence" (Pet. 10), and he correctly recognizes that "these practices are factors that weigh heavily in the court's determination of whether counsel has acted reasonably and competently" (*ibid.*).

Petitioner nevertheless contends that the assistance counsel rendered was constitutionally inadequate in particular respects. In order to establish entitlement to relief based on alleged errors of counsel, the convicted defendant must satisfy a stringent two-part test. First, he must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland* v. *Washington*, slip op. 17) — *i.e.*, he must overcome the "strong presumption" that counsel's conduct fell within the "wide range" of reasonable professional assistance (*id.* at 19). Second, the defendant must show that counsel's deficient performance in turn deprived him of a fair trial and a reliable result (*id.* at 17) — *i.e.*, he must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 24). Petitioner has not met these burdens.

1. Petitioner first contends (Pet. 10-11) that counsel erred in failing to interview a restoration expert, Mohammed Moghbel, who, he maintains,[2] expressed an opinion in 1975 that the stone sculptures were very old. Petitioner has not produced an affidavit of Moghbel to corroborate this assertion or established the reasons for counsel's failure to interview him, if in fact he did not do so. Moreover, even assuming that Moghbel did examine stones that were the subject of the indictment, there is no reasonable probability that this evidence would have altered the verdict. The record is replete with evidence of instances in which petitioner learned of the stones' inauthenticity from various experts during the course of his scheme, and yet he continued to promote them as a worthy investment. See pages 3-6, *supra*; see, *e.g.*, Tr. 221, 590-593, 1580-1581. Hence, any testimony that petitioner might have heard an opinion in 1975, perhaps at the beginning of the investment scheme, that the stones were old would hardly have caused the jury to alter its verdict. In addition, a decision not to call Moghbel might have been a reasonable trial tactic, in view of petitioner's defense that he relied totally on Kosovsky's account of the discovery of the Mayan site. See Tr. 2212, 2578, 2760, 2775.

2. Petitioner next contends (Pet. 11-12) that counsel was ineffective in failing to pursue certain instances of jury misconduct. But as petitioner concedes (Pet. 11), counsel in fact *did* move for a mistrial based on the incident in which an alternate juror had discussions with three jurors about the status of the deliberations (see page; Tr. 2911, *supra* 6). In contending that this action was insufficient, petitioner relies on comments to the alternate juror by one juror indicating that another juror, who was black, may have

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[2]See Pet. 10; Motion for Expanded Rule 2255 Response, Supp. # 1, at 4, filed in district court.

been set in his ways and that he might cause the jury to become deadlocked. See Pet. 12 (citing Tr. 2856, 2871). But these comments in fact were brought out during the district court's in-chambers inquiry that was triggered by defense counsel's action in bringing the alternate juror's communications to the court's attention. Compare *Smith* v. *Phillips*, 455 U.S. 209 (1982). Counsel also challenged the district court's handling of this incident on direct appeal, and the court of appeals rejected the claim. Accordingly, there is no occasion to reexamine on collateral attack the district court's and court of appeals' disposition of this issue (*Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1969)), even though petitioner now has recast it as a claim of ineffective assistance of counsel. Nor is there any reason to believe that the one juror's passing reference to the race of another or his speculation that the latter juror might prove stubborn in deliberations reflected any significant hostility toward him among the other jurors, much less that any such hostility would have been transferred to petitioner, as he now asserts (Pet. 12).

3. Petitioner further maintains (Pet. 12-13) that counsel was ineffective in failing to object to what he asserts were instances of misconduct during the prosecutor's closing argument. In these Section 2255 proceedings in district court, petitioner raised prosecutorial misconduct as a separate substantive issue, quite aside from any inaction by defense counsel in response thereto. The district court, however, rejected his assertions as "conclusory, virtually in their entirety," and held that "such factual allegations as are made are wholly insufficient to implicate any of [petitioner's] fundamental Constitutional rights in any material respect." *United States* v. *Sowers, supra*, note 1, slip op. 5. The court of appeals likewise found nothing in the record to support petitioner's claim of prosecutorial vindictiveness (Pet. App. C2). Since petitioner does not challenge the

conclusion by the courts below that alleged instances of prosecutorial misconduct were without merit in their own right, counsel cannot be held to have rendered constitutionally inadequate assistance in failing to object to those instances of alleged impropriety.[3]

4. Finally, petitioner contends (Pet. 13-15) that counsel rendered constitutionally inadequate performance because he did not object at trial to the admission of what petitioner asserts was hearsay evidence. This contention is without merit. On several of the occasions petitioner cites (Pet. 14), counsel in fact *did* raise an objection on hearsay grounds (Tr. 229, 293).[4] In addition, as petitioner concedes (Pet. 14), the district court repeatedly gave a cautionary instruction about the jury's consideration of co-conspirators' statements (Tr. 210-211, 381, 553-554, 831-832), and counsel several times requested such an instruction (Tr. 739, 817, 908).

Moreoever, even as to those instances in which an objection was not made, petitioner has wholly failed to show that counsel's actions were outside the wide range of professional competence or that there is a reasonable probability that those actions affected the outcome. Under either of

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[3]Petitioner contends that during closing argument, the prosecutor referred to him as a "liar" and a "phoney." See Pet. 13 (citing Tr. 2718, 2727, 2733). However, on the first two of these three occasions, the prosecutor stated that investors were told "lies" as part of the scheme — hardly a surprising observation in a case in which the defendant is charged with fraud offenses. On the third occasion, the prosecutor simply described petitioner's purportedly innocent explanation for his fraudulent conduct as "phoney." There is no reason to believe that this isolated observation had any significant adverse impact on petitioner.

[4]On the first occasion the court overruled the objection without explanation (Tr. 229), and on the second it allowed the testimony because it was not offered for the truth of the matters asserted in the conversation and therefore was not hearsay (Tr. 294). See Fed. R. Evid. 801(c).

those prongs of the inquiry, it would be necessary as a threshold matter for petitioner at least to show that particular evidence would have been excluded if counsel had objected; otherwise there would have been no error — much less a significantly prejudicial error — in the trial. But petitioner has not even made this threshold showing. Several of the transcript pages cited by petitioner contain testimony regarding statements made by petitioner himself (see Tr. 330, 448, 572-573, 708), which obviously would not be excludable as hearsay. Fed. R. Evid. 801(d)(2)(A).[5] Other of the testimony concerned statements made by coconspirators to potential investors that the government alleged were falsely made as part of the fraudulent scheme (Tr. 795, 804-811, 813-815); they therefore obviously were not offered for the truth of the assertions they contained and thus were not hearsay. See *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974); Fed. R. Evid. 801(c). But even assuming that some bits of evidence were erroneously admitted and assuming further that counsel's failure to object was outside the wide range of reasonable professional competence, petitioner has not shown any reasonable probability that the jury's verdict would have been different if the evidence had been excluded. The substantial evidence against petitioner consisted primarily of his own

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[5]At another page of the transcript cited by petitioner (Tr. 324), a witness was simply reading an exhibit that previously had been admitted into evidence (see Tr. 317) (a decision petitioner does not challenge), and the witness was asked when he first had seen another exhibit. We do not understand what objection counsel should have made at that point. Another transcript page cited by petitioner (Tr. 881) contains testimony of a Guatemalan witness, elicited by defense counsel on cross-examination, about his acquaintance with and knowledge of coconspirator Kosovsky in Guatemala. The incident seems trivial, and petitioner in any event has not shown that defense counsel's elicitation of the testimony was not a reasonable tactical decision.

false, fraudulent, or misleading statements made to investors. There is no reason to believe that the additional evidence petitioner now identifies might have had a decisive impact on the jury or, consequently, that the asserted errors by counsel deprived petitioner of a fair trial and a just and reliable result. See *Strickland* v. *Washington*, slip op. 16-17, 24-25, 30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

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